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364-635—69——1

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 535

LAWRENCE F. WALLACE AND BENJAMIN H. BOWIE, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 536

THOMAS J. DONAHUE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1 and 2)[1] is not yet reported.

[1] Pet. references are to the petition in No. 535.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1969. A petition for rehearing was denied on July 2, 1969. The Chief Justice extended the time for filing a petition for a writ of certiorari to August 30, 1969, and on August 29 the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Conversations between petitioners Wallace and Donahue and an informer were monitored and taped. Because of fear for the safety of the informer, who refused to testify, a protective order was placed around these tapes and discovery was denied. The government agreed that the tapes would not be used except upon reasonable notice. It was not until late in the trial that the informer was persuaded to testify. One defendant had already testified; another had completed his direct testimony. The question is whether, in these circumstances, it was error for the trial judge to allow the transcript of the tapes to be used for the limited purpose of rebuttal.

2. Whether it was a denial of due process to deny a request for immunity for a defense witness whose testimony would only add to the impeachment of a witness whose testimony did not relate to petitioner and who had already been thoroughly impeached.

3. Whether the trial judge committed error in refusing to allow a witness, already severely impeached, to be further impeached by questions aimed at demon-

strating an alleged subornation of perjury at an earlier trial.

4. Whether it was error under *Bruton* v. *United States,* 391 U.S. 123, to allow a defendant to be cross-examined by use of prior statements incidentally implicating co-defendants, where such defendant took the stand, was subject to cross-examination, and affirmed the statements as his own.

5. Whether pre-indictment electronic monitoring of conversations between petitioner Donahue and a government informer violated petitioner's constitutional rights.

6. Whether petitioners had a fair trial.

STATEMENT

After a ten-week jury trial in the District Court for the District of Columbia, petitioners were convicted of conspiracy to violate the District of Columbia bribery statute (18 U.S.C. 371; 22 D.C. Code 704).[2] They were each sentenced to concurrent terms of imprisonment of 16 to 48 months.

The evidence showed that in November 1965, one Robert Earl Barnes, a professional burglar with several felony convictions for burglary, testified before a grand jury that petitioners, who were members of the Metropolitan Police Department of the District of Columbia, had accepted substantial bribes on nu-

[2] Petitioners Wallace and Bowie were also convicted of accepting individual bribes, although Bowie was acquitted on one substantive bribery count. Petitioner Donahue was acquitted of bribery. Two other police officers, tried with petitioners, were acquitted of all charges.

merous occasions in return for protecting him from arrest and prosecution.

During the course of investigation, the government monitored and recorded several face to face and telephone conversations between petitioners Wallace and Donahue and one James Skeens, an underworld acquaintance who was a party to the government surveillance. Most of these conversations, containing highly damaging statements, took place in February, 1966. All took place prior to indictment in April, 1966.

Prior to trial, the government informed petitioners' counsel of the existence of these recordings but obtained a protective order[3] denying petitioners discovery of the contents. The order was based on an affidavit by Skeens expressing fear that the disclosure of his identity would imperil the lives of his family and himself.[4] In accordance with Skeens' wishes not to have his identity disclosed, the government attorney stipulated that it was not presently his intention to use the tapes but that reasonable notice would be given if they were to be used at the trial.

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[3] Rule 16(e) of the Federal Rules of Criminal Procedure provides in relevant part, "Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the government the court may permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the court *in camera*. * * *"

[4] The trial judge remarked that he was satisfied that the informer's fear was "bona fide" (Tr. Vol. 24: 3320) and that there was no way the material could be edited to preserve the informer's identity (Tr. Vol. 24: 3273).

During the seventh week of trial, after petitioner Wallace had testified and petitioner Donahue had completed direct examination, the government informed petitioners' counsel that at a late hour the previous evening, Skeens had agreed to testify on condition that armed marshals be provided to protect his wife and child.[5] The trial court conducted a lengthy hearing into the advisability of allowing the government to use this witness and/or the recorded conversations for cross-examination or rebuttal. After taking the matter under advisement over the weekend, the court ruled that Skeens would be allowed to testify but that his testimony or any other rebuttal evidence could only be used within the accepted scope of rebuttal and not to the extent it could have been used in the case-in-chief (Tr. Vol. 23: 3213–3215).

Petitioners' counsel were then provided with transcripts of the recordings and were given time to become familiar with the content (Tr. Vol. 24: 3312–3330). Subsequently, Skeens took the stand and confirmed the government's representation that his fear had previously kept him from testifying. However, after an exchange concerning the extent of waiver of his attorney-client privilege with petitioner Donahue's counsel, who was formerly Skeens' attorney, it was determined that Skeens would not testify (Tr. Vol. 32: 4324a–4368; Vol. 32A: 4416). Thereafter the gov-

[5] Skeens' fear of having his identity revealed apparently was not derived from a fear of any action by these petitioners, but rather, from his underworld associates. Subsequent to the trial, Skeens' wife was murdered.

ernment used the transcripts of the taped conversations on cross-examination of petitioner Donahue.[6]

In rebuttal of petitioner Wallace's testimony, the government called the officer of the Internal Investigation Unit of the Police Department who monitored the conversation between Skeens and petitioner Wallace. He testified to portions of the conversation in which Wallace made inculpatory statements (Tr. Vol. 32: 4383).[7] On cross-examination Wallace elicited portions of this conversation which were favorable to him (Tr. Vol. 32: 4386–4401).

2. During the course of the trial, Barnes testified that in September 1964, he, one Epperson, and another staged a robbery of Stanley Sonneborn's apartment in the District of Columbia. He said that codefendant Denham [8] arranged the robbery for Sonneborn, a bookmaker, so that the latter would not have to pay off on numbers bets he had lost. Barnes also stated that petitioner Wallace informed him after the robbery that Epperson had been identified as a participant (Tr. Vol. 3: 419–433).

On cross-examination by Denham's counsel, Barnes was impeached by use of his testimony before the grand jury in November 1965 in which he had stated that the Sonneborn robbery was staged by one Walter

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[6] Donahue admitted making the statements but attempted to explain that he was lying to Skeens at the time (Tr. Vol. 26: 3547).

[7] This conversation was not recorded due to a malfunction in the recording equipment.

[8] Denham is one of the officers who was subsequently acquitted.

Oberfield, not Denham as he testified at trial, and in which he made no mention to the grand jury of the robbery being staged on Sonneborn's behalf (Tr. Vol. 7:1043–1073). None of petitioners' counsel explored this area on cross-examination. In an effort further to impeach Barnes on this matter, Denham sought to call Sonneborn as a witness and represented that Sonneborn would testify that he did not know Barnes or Denham nor did he ever make an arrangement to be robbed. However, when called to testify, Sonneborn invoked his privilege against self-incrimination.[9] Denham's attorney requested that the government grant immunity from prosecution to Sonneborn. This request was denied.

3. At trial Barnes admitted committing a certain burglary for which he had previously been tried and acquitted. He did not testify at that trial but several witnesses testified on behalf of the defense (Tr. Vol. 3:464–465; Vol. 4:570–571; Vol. 5:775–776). He also admitted committing another burglary for which he was convicted despite the testimony of alibi witnesses. This conviction was reversed on appeal (*Barnes* v. *United States,* 365 F. 2d 509), but prior to the instant trial Barnes pled guilty to the charges. Petitioners sought to question Barnes as to whether he suborned perjury on the part of the witnesses who testified at the previous trials. The allegation was not supported

[9] His counsel represented to the court that the privilege was being asserted to prevent admissions concerning Sonneborn's gambling activities and income which might subject him to prosecutions for violations of gambling statutes or the Internal Revenue Code.

with a proffer of independent proof. The trial judge ruled that (Tr. Vol. 6: 800–801):

> If there had been a charge of subornation of perjury and there had been convictions of subornation of perjury in the other case, that is one thing; but we don't have that. What you are in effect asking me to do is try another case of subornation of perjury which is not present in this case; it is purely collateral.
>
> As far as Barnes is concerned, you have oodles of impeachment material. You are not being deprived of the opportunity to test his credibility. You have the grand jury minutes. You have the Jencks Act statements. You have been able to use them. The jury knows this is a convicted felon who has testified inconsistently in various places.
>
> To go now into a collateral case and ask me to try a subornation of perjury in another matter, I think is going beyond the scope of cross-examination.

ARGUMENT

1. The trial court properly found that the government's notice of its intent to use petitioners' recorded statements was not unreasonable under the circumstances. The government was clearly acting in good faith in not disclosing Skeens' identity or the substance of the conversations. The uncontradicted affidavits and Skeens' testimony at trial amply support the trial court's findings that the government's representations were "bona fide," and that the protective order was necessary (Tr. Vol. 24: 3320). Moreover, contrary to petitioners' allegation, the delay in dis-

closure of Skeens' identity was not a trial tactic of the government. The record shows that Skeens was not persuaded to testify until that particular time during the trial.[10]

The trial judge's decision to let Skeens testify and to allow the tapes to be used for rebuttal did not impinge upon petitioners' right not to testify. Contrast *Harrison* v. *United States,* 392 U.S. 219. Petitioners Wallace and Donahue had taken the stand in full knowledge that the government had an informant whose identity was being protected for his safety, and that this informant had previously engaged them in conversations concerning this case which were recorded and in the government's possession. It was therefore proper for the trial court to conclude that petitioners' decision to testify was subject to the risk that the live testimony of the informant and/or the recordings could be used to impeach their testimony should the informant decide to testify. Under these circumstances, the trial judge, who made the transcripts available to the petitioners and allowed them ample time to digest them, did not err by allowing the government to use these conversations for the limited purpose of rebuttal. Nor did the trial judge abuse his discretion in deciding that the highly probative value of the evidence outweighed the possibility of prejudice and that the public should not be penalized for the govern-

[10] Petitioners' claim that because Skeens was incarcerated further protection was unnecessary and disclosure should have been made prior to commencement of the trial ignores the fact that Skeens feared not only for his own safety, but also for the safety of his wife and child.

ment's inability to persuade Skeens to testify earlier.

2. Petitioner Donahue was not prejudiced by the denial of a request of immunity for tendered defense witness Sonneborn. As admitted by petitioner Donahue, Barnes' testimony did not implicate Donahue in the Sonneborn affair. Furthermore, the testimony of Barnes on this point was severely impeached by the use of his prior testimony before the grand jury on this matter.[11] The denial of a grant of immunity to Sonneborn deprived petitioner Donahue merely of an opportunity for additional impeachment of a matter purely collateral to his case.[12] In cases where the prospective witness' testimony is of such tenuous relevance and importance, it is not violative of due process to refuse to grant a defense witness immunity to enable him to testify. *Earl* v. *United States,* 361 F. 2d 531 (C.A.D.C.), certiorari denied, 388 U.S. 921, and *Morrison* v. *United States,* 365 F. 2d 521 (C.A.D.C.).

3. Petitioners claim that the trial court erred in not allowing them to cross-examine Barnes as to whether he had suborned perjury in two earlier housebreaking trials in which he was the defendant. The trial court has traditionally had great discretion in regulating the

[11] The effect of this impeachment is indicated by the fact that the co-defendant Denham, the person implicated by Barnes' testimony in this matter, was subsequently acquitted.

[12] We note, moreover, that contrary to petitioner Donahue's allegations (Pet. No. 536, 11), Barnes did not receive either statutory or constitutional immunity. He has, in fact, been convicted by his own pleas of guilty to ten felonies in four cases to which he testified both at trial and at the grand jury.

extent and scope of cross-examination. This is particularly true where the cross-examination, as here, is designed solely to test a witness' general credibility rather than to probe substantive issues raised on direct examination. Moreover, the charge of subornation of perjury which petitioner sought to raise was not based on a previous conviction. Previous acts of misconduct which do not result in conviction may not be used. See *United States* v. *Provoo,* 215 F. 2d 531, 536 (C.A. 2).

Furthermore, Barnes was rigorously cross examined for four days. His prior criminal record and his extensive criminal activities during the time of the conspiracy were spread before the jury. As noted *infra,* p. 8, the trial judge recognized that under the Jencks Act the defense was provided with Barnes' numerous prior statements as well as his grand jury testimony which were extensively used by counsel to impeach Barnes' credibility with prior inconsistent statements. In its final charge the court specifically instructed that the testimony of Barnes, as a co-conspirator and accomplice of the defendants, "should be received with caution and scrutinized with care" (Tr. Vol. 35: 4902–4903). Under these circumstances, it was not an abuse of discretion to prevent cross-examination as to petitioners' claim that he had suborned perjury in his previous trials.

4. It was not error to allow cross-examination of petitioner Donahue by statements made by him even

though portions thereof referred to petitioners Bowie and Wallace. Reliance by the latter on *Bruton* v. *United States,* 391 U.S. 123, is misplaced. *Bruton* was founded on the right to confrontation guaranteed by the Sixth Amendment. Here, unlike *Bruton,* the co-defendant, Donahue, testified and affirmed the fact that he made these statements (see *Douglas* v. *Alabama,* 380 U.S. 415, 419-420), so that counsel for petitioners was not deprived of the opportunity to confront and cross-examine. The courts of appeals have uniformly held that under such circumstances no violation of *Bruton* is committed. *E.g., United States* v. *Boone,* 401 F. 2d 659, 663 (C.A. 3), certiorari denied *sub nom. Jackson* v. *United States,* 394 U.S. 933; *Rios-Ramirez* v. *United States,* 403 F. 2d 1016 (C.A. 9), certiorari denied, 394 U.S. 951. Further, the trial judge twice instructed the jury that these statements were made after the termination of the conspiracy and thus were binding only on the person who made them. There is no basis for believing that the instant jury, which returned verdicts which included both convictions and acquittals on specific counts, was unable or unwilling to follow the trial judge's instructions. Cf. *Bruton* v. *United States, supra,* 391 U.S. at 135.

5. Petitioner Donahue contends that the recorded conversations violated his right to counsel under the Sixth Amendment. However all recorded and overheard conversations took place prior to indictment. Thus *Massiah* v. *United States,* 377 U.S. 201, is in-

applicable. As expressed by this Court in *Hoffa* v. *United States,* 385 U.S. 293, 310:

> There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.

Nor, in the present case, did any of the discussions between petitioners and Skeens interfere in any way with their relationship with their lawyers (see *Hoffa, supra,* at 304–309).

Petitioner Donahue also contends that the use of electronic equipment to record his conversations with the informer, with the latter's consent, impinged upon his Fourth Amendment rights under *Katz* v. *United States,* 389 U.S. 347.

As noted by petitioner this question is identical with that pending in *United States* v. *White,* No. 46, this Term, certiorari granted, 394 U.S. 957. It would therefore seem appropriate for this Court to defer consideration of this issue until a decision is rendered in *White.*

6. All petitioners claim that they were prejudiced by inquiry concerning their connections with under-

world characters. The excerpts which they have reproduced, however (Pet. 5–11), rather than indicating undue prejudice, show instead that the trial judge recognized and preserved petitioners' rights. As the court of appeals noted (Pet. App. 1, 31): "When it became apparent these questions were leading nowhere, the trial court cut them short, in time, we think, to prevent undue prejudice to appellants."

Respectfully submitted.

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SEPTEMBER 1969.

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